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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 643

ALBERT THOMPSON,
PETITIONER,

v.

KAWASAKI KISEN, K.K., et al.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT BAY STATE STEVEDORING COMPANY IN OPPOSITION

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Respondent, Bay State Stevedoring Company, prays that certiorari be denied in this action.

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit was rendered on July 7, 1965 and is reported at 348 F. 2d 879 (1965).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., section 1254 (1). The judgment of the United States Court of Appeals for the First Circuit which Petitioner seeks to have reviewed was entered on July 7, 1965.

Statutes and Rules Involved

Rule 43(a), Federal Rules of Civil Procedure, is relevant to the decision of this case and is set forth in the appendix annexed hereto (p. 9).

Questions Presented

Should this Court consider Petitioner's objection to the admission of evidence of payments received by the Petitioner during the period of his alleged disability which was admissible under Massachusetts law, in a diversity jurisdiction case removed from a Massachusetts court to the Federal District Court in Massachusetts?

Should this Court consider Petitioner's objection to the Defendant's further inquiry into the subject of insurance after the Petitioner and his counsel improperly injected such subject into the case?

Statement

The Petitioner seeks review of the judgment of the United States Court of Appeals for the First Circuit affirming the trial court's admission of evidence of payments received by the Petitioner from an undisclosed source during a period for which he claimed disability.

Petitioner has omitted from the Statement in his Peti-

tion the following facts which are material to the issues raised therein.

This is an action by an injured longshoreman to recover damages from a shipowner, Kawasaki Kisen, K.K., which in turn seeks indemnity from the Petitioner's employer, Bay State Stevedoring Company. The action was commenced by the Petitioner in a Massachusetts state court and was removed to the Federal District Court in Massachusetts by the Respondent Kawasaki Kisen, K.K. on the ground of diversity of the citizenship of the parties.

During the trial both the Petitioner and his counsel originally brought to the attention of the jury the presence of insurance in connection with the Petitioner's care and treatment. Thereafter, the trial court permitted counsel for the shipowner to interrogate the Petitioner on his receipt of payments from an unnamed source during the period of Petitioner's alleged disability. Petitioner stated no grounds for his objection to such interrogation and made no request for a limiting instruction to the jury.

Argument

I. It Was Not Error To Permit Interrogation Of The Petitioner On Income Received By Him From An Undisclosed Source During The Period Of His Alleged Disability.

After the Petitioner testified on direct examination to a prolonged period of disability allegedly arising from the accident in issue (R. 26-30), counsel for the shipowner asked on cross-examination whether the Petitioner had received $70 a week, and later $52 a week, from an undisclosed source during that period. The answer disclosed that the Petitioner had received $70 a week for an undefined period and later had received $52 a week. At no time

during the trial was there any direct evidence of the source of such payments.[1]

The judgment of the Court of Appeals affirming the trial court's admission of such evidence was correct and is consistent with the opinions of this Court and the other Courts of Appeals. The cause of action in question is one for ordinary negligence originally brought in the Massachusetts state court. It is not based on any federal statute. Rule 43(a), Federal Rules of Civil Procedure, provides that evidence shall be admitted in an action in a Federal District Court if it is admissible under the rules of evidence applied in the highest court of the state in which the federal court sits or the federal court, and that the rule which favors the reception of the evidence governs. In the Massachusetts courts, in which the Petitioner commenced this action, evidence of the Petitioner's receipt of collateral income is admissible "to affect the weight of plaintiff's previous testimony that he was disabled from working on account of the accident." *McElwain* v. *Capotosto,* 332 Mass. 1, 3, 122 N.E. 2d 901, 902 (1954) (evidence of receipt of workmen's compensation benefits admissible). On Petitioner's general objection, it was not error to admit such evidence if it was admissible for any purpose.

The decision of the court below is not in conflict with any of the cases relied upon by the Petitioner. In *Tipton* v. *Socony Mobil Oil Co., Inc.,* 375 U.S. 34, rehearing denied 375 U.S. 936 (1963), this Court held that evidence of compensation paid to the plaintiff under the Longshoreman's and Harborworkers' Compensation Act[2] was not admissible to prove that the plaintiff was a seaman and not an

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[1] The only basis for Petitioner's speculation that the jury "certainly must have inferred that the $70 and $52 weekly benefits were paid to the plaintiff under a compensation statute" (Petition, p. 7) could be Petitioner's own improper references to the presence of insurance in the case. See Argument II, infra, pp. 6-7.

[2] 33 U.S.C., section 901, *et seq.*

offshore drilling employee. The basis for this Court's holding in the *Tipton* case was that evidence of prior contentions of the plaintiff was not relevant to the issue of the plaintiff's status but that such status was to be determined on the facts of the case before the court.

In *Eichel* v. *New York Central R. Co.*, 375 U.S. 253 (1963), this Court held that direct evidence of the plaintiff's receipt of a disability pension under the Railroad Retirement Act of 1937 [3] was properly excluded. The two factors controlling this Court's opinion in the *Eichel* case are not present here. Unlike the present case, it appears that in the *Eichel* case the source of income was identified as statutory compensation. Of more significance is the fact that *Eichel* was an action under the Federal Employers' Liability Act. [4] Such cases are governed by their own rules of evidence, burden of proof, quantum of proof and related matters. See *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952); *New York, New Haven and Hartford R. Co.* v. *Henegan*, 272 F. 2d 153, 157-158 (1 Cir. 1959) reversed *per curiam* 364 U.S. 441.

In *A. H. Bull Steamship Co., Inc.* v. *Ligon*, 285 F. 2d 936 (5 Cir. 1960) the source of the income of which evidence was excluded was identified as Social Security and Veteran's Pension payments. In that case, upon which the Petitioner himself relies, the court relied upon state law, under which such evidence was not admissible.

The Court below correctly applied the plain language of Federal Rule 43(a) in this diversity action in which no claim was made under a federal statute and in which no reference was made to compensation or benefits paid under any federal act.

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[3] 45 U.S.C., section 228b(a)4.

[4] 45 U.S.C., section 51.

II. The Petitioner Is Estopped To Claim That He Was Prejudiced By The Testimony In Issue, Since Any Such Prejudice Was Caused By The Improper Conduct Of The Petitioner And His Counsel.

Although the Respondents refrained from making any reference to the Petitioner's receipt of compensation benefits, the Petitioner asserts that the jury must have inferred that the payments in issue were paid "under a compensation statute" and "reduced their ultimate award accordingly."[5] Any inferences that the payments received by the Petitioner during the period of his alleged disability were paid by a compensation insurance carrier were drawn directly from statements and references improperly made by the Petitioner and his counsel.

Counsel for the Petitioner told the jury in his opening statement that the Petitioner was treated for his injuries at the "Traveler's clinic." (R. 6a) On direct examination of the Petitioner, his counsel asked:

> "Did you go for treatment at the clinic, at the Traveler's clinic?" (R. 23)

There had been no prior mention of the Travelers Insurance Company or its clinic before these references were made. On cross-examination the Petitioner volunteered, unresponsively, that:

> "I seen a doctor at the Travelers Insurance." (R. 9a)

Counsel for the Petitioner continued to refer to the Travelers Insurance Company in his closing argument to the jury. (R. 13a, 14a)

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[5] Petition, page 7.

Such deliberate references to the fact that an insurance company was involved were highly improper. *Cf. Eichel* v. *New York Central R. Co.* 375 U.S. 253, 255 (1963); *Cotter* v. *McKinney,* 309 F. 2d 447, 451 (7 Cir. 1962). As in *Cotter* v. *McKinney, supra*:

> "We are not here confronted with a reference to insurance coverage made inadvertently by a witness in answering a proper question. We are faced with an argument to a jury made in a deliberate fashion by one skilled in the law, an attorney." 309 F. 2d at page 451.

The Petitioner may not now complain of an error which he himself initiated or invited. It is well established that:

> ". . . if a party interjects in a case incompetent and unrelated facts, the opposite party has the right to give his version of them if otherwise he would be prejudiced." *Twachtman* v. *Connelly,* 106 F. 2d 501, 506 (6 Cir. 1939).

The Court of Appeals did not err in permitting the Respondent shipowner to inquire of the Petitioner's receipt of payments from an undisclosed source. Such inquiry, standing alone, contained no reference to compensation benefits or insurance. Any prejudice to the Petitioner which resulted from the possible inference that the payments he received were compensation or insurance payments was created exclusively by the improper conduct of the Petitioner and his counsel. In any event the trial court did not abuse his discretion in permitting the Respondent shipowner to inquire into insurance matters after the subject was opened by the Petitioner himself.

Conclusion

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

Rule 43(a), Federal Rules of Civil Procedure.

"(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."